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THE PRIVATE INTERNATIONAL LAW OF THE NETHERLANDS

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A summary of the Dutch decisions on private international law should not be considered as a codification on a small scale of settled Dutch law concerning this subject. Judicial decisions have quite a different weight in the United States from what they have in Holland, and it is this difference which we intend to explain in this short introduction, lest the reader should attach greater importance to the following chapters than they deserve.

In Holland a "precedent" is not a solid rock upon which one may rely. Any decision in a matter which the written law does not very positively settle, is apt to be followed by a deviating decision to-morrow. The lower judges are perfectly free to render a different judgment from that of the Supreme Court of the Netherlands (*Hooge Raad der Nederlanden*) or the Court of Appeal. However, it is the duty of the Supreme Court to set aside judgments when the written law has been infringed or misinterpreted. The Supreme Court will of course follow its own view in the interpretation of the law. It is advisable, therefore, for the lower judges to follow the ordinary interpretation adopted by the Supreme Court, for otherwise their decisions will most probably be reversed.

There is no duty, however, to follow the ordinary decisions. Although it is advisable to accept the principles laid down by the Supreme Court, deviation therefrom is not a ground of defense in the lower court, and sometimes a judge has the pleasure of seeing that the Supreme Court agrees with him, changing its former views. Moreover, the decisions of coördinate tribunals carry little, if any, weight. Any court in the Netherlands applies the law just as it thinks it should be, without regard to the decisions of courts situated in other parts of the country. The decisions of the particular appellate court immediately above the judge who pronounces the judgment may have a lasting influence.

Another circumstance restricting the weight of judicial decisions in this country is that the situations presented by private international law offer so much variety that many of them have not been decided by judges, especially not in a small country like Holland. It is true that there are a number of excellent periodicals in which all important decisions of the different countries are published, but in addition to the questions dealt with in the actual decisions there are a great many others. The lawyer requested to give an opinion on such a question, and the author who tries to answer it, usually follow the prevailing view among the text-writers. The courts also often refer to the views of such writers. In the discussion below it will be necessary now and then to state the opinion of authors concerning certain problems, because their opinion—just as in the law of nations—has a very large authority.

We mentioned above the general control of the Supreme Court over the lower courts, guaranteeing that the lower judges will not render decisions differing too much from the usual interpretation of Dutch written law. The law which allots this task to the Supreme Court only mentions infringement and misapplication of the law. The Supreme Court has jurisdiction, therefore, to determine whether the Dutch judge omitted to apply a provision of a foreign law which according to Dutch law he was bound to apply, but that Court is powerless to do anything after the judge has applied the foreign law, even if it be in an erroneous way.¹ All decisions concerning the interpretation of foreign law are withdrawn, therefore, from the general control of the Supreme Court, so that the judge has complete liberty, provided he observes the provisions of the Dutch law.

To offset this drawback there is another circumstance which increases the weight attached to the decided cases and to the views of text-writers. The Dutch codes contain only a few legal provisions concerning private international law. The gaps must be filled, therefore, by the decisions of the courts. The Dutch courts apply foreign law in a very liberal way when the nature of the matter, equity, or the general needs of international intercourse require it. The decision is often the result of a thorough consideration of the tendency of Dutch legal provisions and their influence on the matter. Such provisions sometimes concern national matters only; sometimes they intend to operate also in the international sphere, either because they are of predominating moral or public importance, or because the foreign law in question, if determining the matter, would be at war with Dutch notions of domestic policy and morals. A law will often be applied after comparing various laws with each other, and taking cognizance of the principles prevailing in all civilized countries, i. e., of the

¹ Sup. Ct. (Nov. 27, 1868) *Weekblad van het recht*, 3073 and (March 19, 1909) *Weekblad van het recht*, 8844. This periodical will be indicated as "W."

principles of common international law or a kind of private law corresponding to the principles adopted by all mankind.²

STATUS AND CAPACITY

When a legal question has connection with more than one country, one speaks about a conflict of laws. In choosing the applicable law, two methods may be followed. The matter may either be dealt with as a conflict, and a law is chosen which offers the greatest connection with the matter, or harmony may be sought by applying the rules which respect the various laws as much as possible and correspond most to general international intercourse. These rules constitute, as it were, a common international law.

The contrast between these two methods can be identified with the names of the two leading Dutch authors on private international law, viz. the former with Kusters, the latter with Josephus Jitta.³ The renowned lawyer, T. M. C. Asser, felt inclined to consider the matter as a conflict of laws.⁴ The decided cases show many examples of both methods, but the doctrine of the conflict of laws is predominating. Both methods often come to the same result. This is especially so with regard to status and the capacity of persons. Everyone chooses the law governing the person as that which follows the individual everywhere.

But what law is this? Residence only is disregarded by the Dutch judges, because travelling across the frontier does not change one's personal law. Generally speaking, the alternative is to be found in nationality and domicile. Sometimes, however, notions of public policy and good morals may have a great influence; moreover, the consequences of the principle of "renvoi," the autonomy of the parties as to the choice of a suitable law, and the doctrine of fraudulent evasion of the law, may cause exceptions to the rules, so that neither nationality nor domicile is decisive, but the *lex fori* is applied.

According to the settled law of the Netherlands nationality determines the law governing this matter. This does not entirely agree with the historical significance of the *statum personale* in this country. Gradually Dutch lawyers have abandoned the doctrine of the rule of domicile, though some centuries ago, all Dutch authors were adherents of this theory. Nevertheless, we do not go as far as the Italian school in adhering to the principle of nationality; in Holland people are

²The author follows Jitta's view of the conflict of laws, one which contrasts sharply with the view prevalent in Anglo-American jurisprudence. See a review of Jitta's latest book, *The Renovation of International Law*, in (1920) 29 YALE LAW JOURNAL, 700.

³J. Kusters, *Het internationaal burgerlijk recht in Nederland* (1917); Josephus Jitta, *Internationaal privaatrecht* (1916). These two works will be mentioned as "Kusters" and "Jitta."

⁴T. M. C. Asser, *Schets van het internationaal privaatrecht*.

not subjected to their national law in every respect. We want a permanent standard governing the whole individual and possessing a conspicuous character. This standard should be applied also abroad. Domicil is apt to be altered and is therefore unfit for the purpose. The personal law of the citizen is so closely connected with the history, climate, and tradition of his country, that everybody born under the government of that law ought to be governed by it, wherever he goes.

As regards Dutch law, this rule is to be found in article 6 of the law containing general provisions of legislation in the kingdom, which gives some general provisions on private international law.⁵ This article tells us that the laws concerning the rights, status, and capacity of persons follow Dutch subjects abroad. The article indicates the law governing "status," that is to say, minority, legitimacy, guardianship, etc. "Capacity" means the power to act with or without legal assistance, for example, the power to marry, to conclude contracts, to appear as a legal representative. The Supreme Court has decided that the capacity of a trustee, according to English law, belongs to the "capacity" mentioned in this article.⁶ It also includes power to dispose of movables and immovables; the *lex rei sitae* does not govern this point.

"Rights" does not include all subjective rights, but only those connected with personal capacity. Rights of inheritance and the law relating to contracts are not considered to be subject to the national law. Our courts reckon among "rights" the prohibition of adoption and of divorce by mutual consent. The judges have of course much freedom in applying this rule. In this way it was decided that the question of the recognition of an illegitimate child by the father should be judged according to the national law of the child, especially as to the question whether the assent of the mother is a necessary condition to such recognition.⁷

Corporations are dealt with in the same way. The country in which they reside determines their nationality, the latter following each corporation abroad. Some time ago, in keeping with the current of public opinion in belligerent countries, a tendency arose to consider the nationality of the majority of shareholders or directors of jointstock companies as the decisive point. Professor Molengraaff, of the University of Utrecht, is one of the chief supporters of this point of view.⁸ Until now it has not been adopted by the courts.

In the case of a partnership the nationality of the partners is always examined, because the partners are independent and individually re-

⁵ Law of May 15, 1829, *Staatsblad*, 129. This statute will be indicated as "*Wet Algemeene Bepelingen*" or "*Wet A. B.*"

⁶ Sup. Ct. (Feb. 22, 1850) W. 1139.

⁷ Trib. Amsterdam (June 26, 1911) W. 9422; Ct. of App. Amsterdam (May 2, 1913) W. 9557.

⁸ W. L. P. A. Molengraaff, in (1918) *De Gids*, 291.

sponsible. The nationality of each of them ought, therefore, to be determined separately, and the judge must decide which of the partners of a foreign firm should give bail when the firm is a plaintiff.⁹

The national law is applied both to foreigners in Holland and to Dutchmen staying abroad. Formerly foreigners were not on the same footing as Dutchmen. They did not participate in the social life, but only enjoyed a certain "natural" right, for the sake of humanity, while the "civil" rights were granted to natives alone. Article 9 of the Dutch *Wet A. B.* declares that the civil law of the Kingdom is the same for foreigners and Dutchmen, as long as the law does not positively state the contrary. This clause does not mean that all provisions of Dutch law are applicable equally to foreigners and to citizens. In the first place, even Dutchmen are often subject to foreign law, just as foreigners may be. Secondly, if the judge were absolutely obliged to apply Dutch law to foreigners, while foreign judges might subject a Dutchman to his own national law, a wrong might be done to the foreigner. The provision was intended to extend to foreigners the enjoyment of all civil rights to the same extent as they are enjoyed by natives, and to put an end to the spirit of intolerance. It does not go any farther. The courts usually connect article 9 with article 6, holding that the personal status of foreigners in Holland is governed by their national law.¹⁰ In the same way the law governing matrimonial property of foreigners who have married abroad, is governed by their national law.¹¹ Dutch judges may deprive an Austrian father of his parental power, because Austrian law permits this.¹²

There are some exceptions to the rule of equalization between foreigners and Dutchmen, especially concerning matters of procedure, which are survivals of the time when foreigners were discriminated against (seizure, giving bail, imprisonment for debt, succession, etc.). We only mention these matters here in passing.¹³

With relation to the competence of the Dutch judge to alter the status of persons of another nationality, it has been held by the Supreme Court that Dutch Courts may pronounce a divorce between foreigners, but that such a divorce is only possible for causes specified by the Dutch law, as the *lex fori*, so that as regards foreigners this matter does not depend upon their national law.¹⁴

⁹ Trib. Utrecht (June 12, 1900) *Weekblad voor privaatrecht, notarisambt en registratie*, No. 2541. This periodical will be indicated by "W. P. N. R."

¹⁰ Sup. Ct. (May 31, 1907) W. 8553; (Jan. 5, 1917), (1917) *Nederlandsche Jurisprudentie*, 143. This periodical will be referred to as "N. J." We shall meet more examples in dealing with particular matters.

¹¹ Sup. Ct. (January 8, 1915) W. 9762.

¹² Ct. Amsterdam (June 21, 1915) W. 9869.

¹³ Code of Procedure, arts. 127, 152, 585, 768, 885; law of April 7, 1869, *Staatsblad*, 56, in connection with arts. 884 and 957 of the Civil Code; Commercial Code (*Wetboek van Koophandel*), arts. 310, 316, and 748.

¹⁴ Sup. Ct. (Dec. 13, 1907) W. 8636.

As regards Dutchmen abroad, the principle of the application of his national law neither affects the jurisdiction of foreign courts, nor the application in other countries of foreign rules of procedure. It is true, there is a decision to the effect that the status of Dutchmen can only be altered by their national courts according to Dutch law,¹⁵ but this decision is an isolated one. As a rule, foreign decrees relating to the status of Dutchmen are considered valid, unless Dutch public policy is affected thereby. We meet such recognition of foreign judgments in a decision of the Supreme Court, holding that a divorce pronounced by a court in the United States of America between Dutchmen, with due observance of the Dutch provisions relating to divorce, is valid.¹⁶

It may be observed that sometimes a court is inclined to apply the national law to a matter as a whole, and besides this to apply to each of the persons playing an inferior part in the matter his own national law. This, of course, may concern foreigners as well as Dutchmen. In these cases the Dutch law will apply only one law to all these persons, viz. that which governs the whole subject-matter. In this way the power of foreigners to prevent marriages by legal opposition is always governed by the personal law of the betrothed, not by the law of the person desiring to prevent the marriage. The power of a woman to be a guardian is to be determined according to the national law of the child, not according to the national law of the woman herself. There are some exceptions: it is held that the right to demand the guardianship of a lunatic is governed by the law of the person who demands it, not by the national law of the lunatic.¹⁷

Generally speaking, a change of nationality subjects the status to the new nationality. A Dutch minor becomes of age in marrying a Dutchman, but not when she marries an Austrian, because in doing so she acquires the Austrian nationality and according to Austrian law marriage does not cause a woman to become of age.

Transactions entered into prior to a change of nationality are governed, however, by the former national law. Vested rights are respected, though all new circumstances are governed by the new law. When a person is of age according to his former personal law, but still under age according to the new law, such a vested right is respected, notwithstanding the new nationality. Where the status of a man has been determined in a certain country by authority—for example, by the nomination of a guardian—such a status remains as it is, though the nationality of the ward has altered, up to the moment the magistrates of the new country make new provisions in the matter.¹⁸

¹⁵ Sup. Ct. (June 16, 1905) W. 8248.

¹⁶ Sup. Ct. (Nov. 24, 1916) W. 10098, (1917) N. J. 5.

¹⁷ Trib. 's Hertogenborch (Dec. 23, 1910) W. 9171.

¹⁸ Trib. Amsterdam (Nov. 17, 1911) W. 9366.

A change of nationality has its importance also in connection with the doctrine of fraudulently evading the law.¹⁹ Does a change of nationality cause annulment, if such change is made for the purpose of performing acts which have no validity in the Netherlands? Many people think that such an act will be valid and that the change of nationality does not affect its validity.²⁰ According to this theory the old personal law would not be applicable when the connections with Dutch law have disappeared. Others deny the validity of such acts, when they have an immoral character or tend to evade Dutch law or injure the rights of a third person. Nevertheless, an act performed after a change of nationality deserves to be admitted as valid, with this exception, that such recognition is to be denied when the intention has been to evade the domestic policy of the Dutch law, even though the person concerned has obtained a re-naturalization in Holland. Such is the case where a Dutchman alters his nationality in order to marry his former accomplice in adultery, a marriage which Dutch law prohibits.²¹ Our courts have not had an opportunity, however, to decide this question, so that we are without judicial authority in the matter.

THE FORM OF LEGAL ACTS

Even the older Dutch authors applied the law of the *loci actus* to the form of acts. One of them, Paul Voet, used to classify the provisions relating to the form of acts into a separate category of statutes, viz. the *statuta mixta* by way of contrast with the *statuta personalia* and *realia*.

The reason for this rule in the beginning was the idea that in performing acts an individual submits himself voluntarily to the sovereignty of the State in which he is acting. Later on, the *statutum mixtum* was justified on the ground of convenience, in order to facilitate intercourse; it ought not to be necessary for a person to observe the forms of his personal or his domiciliary law in a foreign country, and the observance of the forms prescribed by the law of the country where one is acting should be considered to be sufficient. Besides, it would sometimes be impossible to follow one's proper law, because the local officials might not be able to observe its provisions, or such officials might not exist in the place. That is why article 10 of the Dutch *Wet A. B.* declares: "The form of all acts is determined by the laws of the country or the place where those acts are performed." It is quite certain that, as a consequence of this provision, an act executed abroad, being valid by the law in force in such a country, has to be recognized in Holland. Our courts hold the same as to the validity of mortgages, given in England according to English law.²²

¹⁹ Kosters, 170. ²⁰ Asser, *op. cit.* note 3, at p. 43.

²¹ Art. 89, Dutch Civil Code.

²² Ct. The Hague (Dec. 24, 1915), (1916) N. J. 620.

However, it is very difficult to say whether our rule has an optional or a mandatory character; whether an act, which is void according to the *lex loci*, can be considered as valid in the Netherlands. Opinions differ with respect to this question. Most of the authors are inclined to say that the rule is strictly mandatory. According to this doctrine it is indifferent whether an act is valid as to the national or domiciliary law or to the *lex rei sitae*: it must conform to the *lex loci actus*.²³ Josephus Jitta, who looks upon article 10 of the *Wet A. B.* as indicating only a direction, also tends to the opinion that the rule is mandatory, but proposes by way of safety-valve that it has an optional character wherever the application of the *lex loci* would lead to irrational consequences.²⁴

The decisions of the Supreme Court are not very conclusive, but are inclined to prefer the mandatory character of the rule. The Court directs the judges to examine whether a bill drawn abroad according to the law of that country is in fact a bill so far as the formal requisites are concerned, and regards article 10 of the *Wet A. B.* as violated if the judge neglects to make this examination. But the Court does not answer the question whether the bill can be regarded as such by virtue of some other law, if the *lex loci* has not been observed.²⁵

Other jurists, following the view of the older Dutch authors, are opposed to such a severe doctrine and regard the rule as an optional one. Among other arguments they appeal to the provisions of the Hague treaties, in which this character of the rule has been recognized.²⁶ Moreover, they rightly say that the rule in this form tends to facilitate international trade and to promote legal security. It could never have been the legislator's intention to invalidate an act in consequence of this rule, if, but for this provision, the act would have been valid. According to this doctrine the observance of the rules of another law than the *lex loci actus* is sufficient. The above-mentioned treaties, for example, are sometimes satisfied if the personal law common to the parties is complied with. Excepting the cases involving application of these treaties, Dutch jurisprudence furnishes no instances where a legal transaction which did not satisfy the formal requirements of the law has been sustained by reference to another law.

The rule, "*locus regit actum*," governs only the form of acts, but not the consequences of acts concerning movables and immovables. These consequences are submitted to their proper law. This is shown by the following example. A gift of real estate situated in the Netherlands was made in Prussia according to the local form, viz. by

²³ Asser, *op. cit.* note 3, at p. 44; Opzoomer, *Aanteekening op de Wet A. B.*, 189.

²⁴ Jitta, 138-140.

²⁵ Sup. Ct. (June 4, 1915) W. 9871, (1915) N. J. 865.

²⁶ Art. 7 of the Marriage Treaty; art. 6 of the Treaty on Matrimonial Property; Koster, 185; E. M. Meyers in note, Sup. Ct. (June 4, 1915) W. 9871.

means of a judicial deed. Afterwards this act was entered upon the Dutch public register. The Court of Gelderland decided that the gift was valid, though the Dutch law required a gift to be made by notarial deed.²⁷ The decision was right, because the *lex loci* had been observed as to the gift itself, while the forms of the Dutch law had been followed with regard to the transmission of property.

As regards obligations, also, a difference must be observed between the form and the subject-matter itself. The law governing the obligation is not always the law of the place where the obligation was formally entered into. Indeed, the rule "*locus regit actum*" should not be extended farther than is warranted by the intention of the legislator. The subject-matter itself ought to be governed by the law which offers the closest connection with the particular circumstances, even though this law is not the *lex loci actus*.

When the law of the country where an act is performed requires "authentic" forms, the conditions to be observed are to be judged according to the law of the country where the act has occurred. Our courts sustain this opinion. A German *Beglaubigungsurkunde* has been accepted as an authentic document in a Dutch forgery case.²⁸ A document, written by a Genoese broker who was legally authorized, was admitted as authentic evidence regarding a contract of sale concluded in Italy.²⁹ These decisions have been rendered notwithstanding the fact that the forms of both laws were totally different from the Dutch forms.

With respect to statements on bills of exchange and other commercial paper, every act has to be considered as a separate one. The validity of an acceptance made in Holland has to be judged according to Dutch law, even if the bill has been drawn abroad;³⁰ the form of a notice of dishonor depends on the law of the country where the bill has been protested.³¹

Though article 10 of the *Wet A. B.* is our general rule, some Dutch laws contain special provisions concerning marriages of Dutchmen abroad, wills, mortgages, etc. In most cases these provisions are applied more strictly than might be expected from the general rule.

PROPERTY

Immovables. The condition of immovables and all other matters connected therewith is to be determined according to the law of the country where the land is situated. There is no doubt about this so-called "*statutum reale*." In the first place, the law of immovables being organized with reference to the public interests of each state,

²⁷ Ct. Gelderland (May 6, 1856) W. 1765.

²⁸ Trib. Almelo (Dec. 2, 1896) W. 6925.

²⁹ Trib. Rotterdam (June 24, 1914) W. 9727, (1915) N. J. 362.

³⁰ Trib. Amsterdam (Dec. 27, 1912) W. 9570, (1913) N. J. 94.

³¹ Ct. Amsterdam (Oct. 22, 1897) W. 7089.

it follows that the private law of that state as to immovables must be supreme. Secondly, the security of intercourse requires that a right acquired according to the *lex rei sitae* should be protected. The same rule applies to the creation abroad of rights in immovables situated in other countries. Article 7, *Wet A. B.*, provides, therefore: "As to immovables, the law of the country or the place where they are situated, must be applied." The rule does not include the capacity to do acts relating to immovables. Capacity is subject to the personal law, while the form of acts is governed by the *lex loci* instead of the *lex rei sitae*.

There is another limitation to the application of the general rule. Where the legal status of an estate as a whole (movables and immovables) is concerned—an inheritance, a community of goods between husband and wife, a bankrupt's estate, and so on—many think that it should be governed by one law irrespective of the situs of such property.³² Though some of the earlier decisions support this point of view, the Supreme Court held that every immovable belonging to an estate was to be governed by the law of the country where it was situated.³³

Wherever the *lex rei sitae* is the applicable law, the conveyance of immovables is controlled by that law. This is the case also with respect to movables, which we shall consider in a moment. Dutch law requires for the transfer of title the agreement of the parties and the delivery of the property. The delivery of movables takes place by simple transfer and that of immovables by making and delivering a written document, which ought to be entered upon the property register. As a consequence of this, two foreigners are indeed competent to pass title to property situated in Holland, but such transfer has no effect if the provisions of the Dutch law with regard to delivery have not been duly observed. Whenever immovables are to be transferred, therefore, a deed should be executed and entered upon the Dutch registers. According to the well-known rule concerning the form of legal acts, such a document is to be considered as valid when made abroad according to foreign law. The registering of such documents in the Netherlands completes the conveyance of the property in that country.

There is one exception to the foregoing in the Dutch written law. Article 1218 of the Civil Code states that an immovable situated in the Netherlands, cannot be mortgaged, in the absence of a treaty, by a contract entered into in another country. No such treaty exists up to the present time.

The Dutch courts follow the same system when the property is in a foreign country. They apply to such estates the foreign *lex rei sitae* and consider the conveyance of the property as valid if the provisions of that law are satisfied, even when those of the *lex fori* are different.

Movables. One may say that movables are so closely connected with the owner that the personal law should govern this species of property. According to the newer theories the national law is decisive; while the countries still adhering to the law of the domicile in their system of the conflict of laws—a rule which is disapproved in Holland—apply that law. The latter conclusion has also been reached by those raising the fiction that movables are always present at the domicile of their owner, so that the *lex rei sitae* coincides with the *lex domicilii*. This fiction had some sense at the time when all movable goods were taken along on one's body, or were located in one's house, but with the increased importance of personal property it has lost every semblance of justification.

Under these circumstances it would be much more true to fact if the law of the place where the movable is actually to be found were applied.³⁴ The necessity of securing international intercourse supports this standpoint, for these interests require the territorial application of the law to all movables within the limits of a certain territory. This principle is preferable to that of nationality or domicile. Everyone acquiring in good faith rights relating to certain goods under the law of their situs ought to be protected.

There is no express provision on the subject in the Dutch Civil Code, but we find this principle in a decision which holds the transfer of the property in a Belgian vessel, by virtue of a contract made in Holland, to be subject to Belgian law, according to which a simple contract is sufficient and transcription upon a register is not necessary.³⁵

The protection of good faith does not go any farther than is necessary, especially when movables are transported to another country, where another person whose good faith has the same claim to protection obtains rights with respect to such goods. Our law on this question is not settled. Suppose that stolen goods are claimed by the owner from a third party who is in possession. The various laws prescribe a longer or a shorter time within which an action for the recovery of stolen property must be brought. If the goods have been stolen abroad and transported to the Netherlands, the time fixed for the recovery of such property by the foreign law not having as yet expired, the owner cannot demand them back from a third person who has obtained the property in good faith, if the period fixed by Dutch law has expired. The protection of good faith prevails in this case over that of vested rights.

There is a difficult conflict when the property in goods transported from one country to another, is transferred by the delivery of such documents as bills of lading, which represent the goods. In such cases we prefer to recognize the rights of the person who becomes in good faith owner of the documents. The Tribunal of Rotterdam has

held, nevertheless, that the original sender of a quantity of currants forwarded from Patras to England, does not lose his right to stoppage *in transitu* in Holland, where it lay on its way to England, though the bill of lading had already been indorsed to an English merchant.³⁶

Jura in re aliena. The *lex rei sitae*, governing the condition of movables and immovables, is also applicable to the *jura in re aliena*, existing with respect to such property. This law decides what rights can be created, what is their nature, and how they can be extinguished. No rights can be created in property situated in the Netherlands, which do not exist under Dutch law, for example, the "antichresis" of the French law and the "mortgage" of the English law.

A question arises concerning movables: does the Dutch judge recognize *jura in re aliena* created abroad according to the *lex rei sitae* with respect to movables, when such goods are later on transported to the Netherlands? He will not do so when the Dutch laws do not know such a right or differ for the greater part from the foreign law. Dutch law, for example, requires that a pledge should be delivered to the pledgee; a foreign law, therefore, which does not contain the same provision cannot be recognized in Holland to the prejudice of third persons.

Rights established abroad must not conflict with the public policy of the forum nor with the interests of third persons. But if no such interests are injured, the right is deemed to be valid. It was in accordance with this system that our Courts decided that movables had been validly pledged abroad by pledging the bill of lading, because this kind of pledge agreed with Dutch law and no good faith of third persons was injured.³⁷

The same point of view has been followed with respect to mortgages on vessels. Rights created according to the law of the flag are recognized, even though the ship is plying between foreign ports. Dutch courts are likely to recognize most of these rights, because they are in conformity with Dutch law. The validity of English mortgages on ships putting into a Dutch port has been sustained, because the rights created thereby, like those created by Dutch mortgages, tend to secure the creditor, and because they operate against third persons only after being entered in public registers. It was not deemed necessary, therefore, to transcribe these rights upon Dutch registers. But the order of these rights and of those created in the Netherlands is to be determined according to Dutch law.³⁸

³⁶ Trib. Rotterdam (Dec. 6, 1905) W. 8447.

³⁷ Trib. Rotterdam (June 2, 1910) W. 9159; Ct. The Hague (April 18, 1913) W. 9569.

³⁸ Trib. Rotterdam (Jan. 31, 1913) W. 9525; Ct. The Hague (Dec. 24, 1915) W. 9908.

OBLIGATIONS

A sharp distinction has to be made between the laws relating to the subject-matter of obligations and those relating to capacity and the form of acts, especially in contracts.

Contracts in general. As to contracts the general rule of jurisprudence is that the parties are free to state what law shall govern their mutual relations. In other words, the principle of autonomy controls. If a particular law has not been chosen expressly, the question is whether the parties contracted with a particular law in mind.³⁹

Sometimes it is probable that a will of the parties really existed, even if it was a silent one. This can be deduced from certain expressions used in the contract, which are connected with foreign circumstances and institutions.⁴⁰ The language used may refer to a certain law; the mere employment of the language of a foreign country by no means proves, however, that the law of that country ought to be applied.⁴¹ The way in which the parties were, in the habit of concluding contracts, or the mode of performing the contract in question, may have influence. The fact that the contract mentions a court or certain arbitrators in a particular country as competent judges does not prove at all that the parties intended the law of that country to be applicable also to the obligation itself.⁴² Such a clause—as well as the language employed—may aid, however, in showing that the parties adopted a particular law. A recent case held that when a Dutch policy of insurance refers to the conditions and customs of the English Lloyd's policy, such a reference does not imply that English law is applicable to the contract as a whole. The insurance having been taken out in the Netherlands, Dutch law will govern those matters which have not been regulated in the Lloyd's policy.⁴³

In the above cases there was an actual will of the parties, though not always plainly expressed. What is to be done if they did not even think of the applicable law? In this case it will be best to look for an objective standard and to construct a presumptive will of the parties. Our decisions furnish many examples in which the judges examined the probable intention of the parties and chose the law which they probably would have chosen as the most suitable one, if their

³⁹ The autonomy of the parties is taken into consideration by Ct. Amsterdam (Dec. 31, 1908) W. 8852; Ct. The Hague (March 15, 1910) W. 8984; Trib. Amsterdam (Dec. 22, 1911) W. 9300.

⁴⁰ Trib. Utrecht (March 25, 1914) W. 9754.

⁴¹ Trib. Rotterdam (March 17, 1910) W. 9126; Ct. The Hague (Nov. 14, 1913) W. 9615.

⁴² Ct. The Hague (Feb. 10, 1911) W. 9161; Trib. Amsterdam (March 31, 1911) W. 9208.

⁴³ Trib. Rotterdam (March 26, 1919) W. 10387; *id.* (May 7, 1919) W. 10443; and (May 15, 1919) W. 10431.

attention had been drawn to it.⁴⁴ In international law the courts will generally select the law which has the closest connection with the contract in question. The place where a contract has been concluded is of great importance, because the parties are influenced by the customs and opinions of that place to such an extent that they may be supposed to have chosen that law as the most suitable one.

Moreover, the courts are conscious of the fact that everything not immediately touching the contract itself, such as the performance and the consequences of non-fulfillment, has a closer connection with the place where the contract is to be performed. Many judges say even that the law of the place of performance governs the whole contract. This opinion—which appears to prevail in the United States over the doctrine of the personal or the domiciliary law of the debtor—is gaining ground with the Dutch courts.

Kosters⁴⁵ defends the *lex loci contractus* as applicable to contracts and bases his opinion upon a provision of the Dutch Civil Code⁴⁶ which says that ambiguous contracts should be interpreted according to the customs of the country or the place where the contract has been concluded. Leaving out of consideration the question whether the legislator meant to lay down a general rule of private international law, the provision has never been cited for this purpose in any decision, so that it is probable that the courts will seek their arguments elsewhere, notwithstanding the ingenious discovery of Mr. Kosters. The courts hold that either the *lex loci contractus* or the *lex loci solutionis* ought to be applied, or even both of them together, each being applicable to a separate part of the contract.⁴⁷ There are a great number of cases in which the law of the place of performance is chosen, notwithstanding article 1382.⁴⁸

On the other hand, we find decisions giving preference to the law of the country where the contract has been concluded. In these cases the performance is submitted also to that law, because the performance, being the main part of the contract, is naturally governed by the law applicable to the entire contract.⁴⁹ The performance and the non-fulfillment, as well as the consequences of both of these matters, are deemed so inseparably connected that one law should be applied. Only this restriction ought to be made in favor of the *lex loci solutionis*, that the modes of performance are to be governed by the latter law, especially because every country has its own customs in this respect and because most of the laws provide that contracts also imply the fulfilment of duties imposed by custom and usage.⁵⁰

⁴⁴ Ct. 's Hertogenborch (Jan. 22, 1901) W. 7555; Ct. The Hague (March 15, 1910) W. 8984.

⁴⁵ Kosters, 745.

⁴⁶ Art. 1382.

⁴⁷ Ct. The Hague (Nov. 14, 1913), (1914) N. J. 429.

⁴⁸ Trib. Rotterdam (Nov. 9, 1911) W. 9345; Trib. Amsterdam (Dec. 31, 1914) W. P. N. R. 2358, (1915) N. J. 308.

⁴⁹ Trib. Middelburg (April 4, 1888) W. 5592; Trib. Breda (May 22, 1917), (1917) N. J. 594.

⁵⁰ Art. 1345, Dutch Civil Code.

Our courts prefer the *lex loci contractus* to the personal or domiciliary law. This is so even when the contract in question is concluded in America between a Dutch and an American citizen, or when both parties have the Dutch nationality, but concluded their agreement in another country in which it is to be performed.⁵¹ The place of contracting has an accidental character, however, so that if such a contract has been concluded abroad between two Dutchmen and is to be performed in their own country, their personal law must be applied.⁵²

The courts when asked to decide a matter arising out of a contract concluded by correspondence or by telegraph, determine generally in the first place where the contract was made. They have a choice between the law of the place where the offer has been accepted, that is, where the acceptance of the offer has been declared (declaration theory) and the law of the place where the acceptance has come to the notice of the offeror (cognition theory). Our courts have very generally adopted the latter system. The application of the *lex loci contractus* means, therefore, the law of the place where the offeror learned that his offer had been accepted.⁵³

Difficulties may arise when the laws of the countries concerned differ as regards the place where the contract was concluded.⁵⁴ This may occur with respect to Dutch and American law, because the American law generally deems the contract made where the offer was accepted.⁵⁵ Kusters proposes the following solution for these puzzles.⁵⁶ According to his suggestion the law of the offeror is to be chosen, because the offer is the starting-point of the whole matter, and the other party, in accepting the offer, must be deemed to have voluntarily entered into the sphere of the law of the offeror. So far as we know this reasoning has not yet been accepted by our courts.

Contracts concluded through agents are very much influenced by the consequences of mutual confidence. This was recognized by the court of The Hague in a case where a contract had been concluded at Genoa between an Italian citizen and the representative of a Dutchman. This representative did not possess the authority required in cases involving the subject-matter of the particular contract, according to Dutch law, but according to Italian law the other party was justified in assuming that he had the requisite authority. The court

⁵¹ Trib. Amsterdam (June 30, 1905) W. 8289.

⁵² County Court (Dec. 22, 1916), (1917) N. J. 132.

⁵³ Trib. Rotterdam (June 8, 1902) W. 7859; Trib. Amsterdam (Jan. 6, 1911) W. 9253; Trib. Rotterdam (Oct. 26, 1911) W. 9401.

⁵⁴ This involves the theory of qualifications, concerning which see E. G. Lorenzen, *Theory of Qualifications* (1920) 20 COL. L. REV. 247.

⁵⁵ Westlake, *Private International Law* (5th ed. 1912) sec. 224; *Wester v. Casein Co.* (1912) 206 N. Y. 506, 100 N. E. 488, (1913) Clunet, 661.

⁵⁶ Kusters, 767.

held that this party's confidence in the authority of the representative ought to be protected, and that a valid contract had been made.⁵⁷

As to interpretation of contracts, article 1378 of the Civil Code lays down general rules of private international law. Foreign provisions relating to interpretation may be resorted to as guides only when the terms of the contract cannot be understood.⁵⁸

In the beginning of this chapter we said that the capacity to conclude contracts is not governed by the law applicable to the contract itself, but by the personal law of each of the parties. One might be inclined to follow the same system in respect to the lack of free consent if caused by violence, error, or fraud, circumstances which may affect the validity of contracts. These influences are not connected, however, with the personal qualities of the parties. They operate upon the mind from the outside and are closely connected with the law governing the contract itself, and are to be considered, therefore, as quite separate from the question of capacity.

Dutch courts sometimes decline to apply foreign law to contracts when the subject-matter is connected with another country. Certain interests, deemed to concern public policy, will prevent some contracts from being recognized, though they have been validly concluded according to foreign law. Although the Dutch law contains a prohibition of lotteries unless authorized by special law, the sale of shares in a foreign lottery may easily be recognized; but Dutch judges cannot condemn a person to deliver such shares, because the taking of an active part in the transfer of such shares is forbidden by public policy.

The Dutch courts are unsettled with respect to the question whether sales on margin are to be considered as wagers prohibited by Dutch law. There is a tendency to affirm this question if the parties do not intend to deliver the goods but to pay only the differences. This very uncertainty causes such sales validly entered into to be recognized in Holland as not being in conflict with any public policy.⁵⁹

Let us consider for a moment the capacity of parties to deviate by contract from the general rules relating to the jurisdiction and competence of courts. Our courts hold that Dutchmen having their residence abroad are competent to agree that a foreign court or arbitrators shall determine any disputes arising out of a contract which they have entered into. The principle of the autonomy of the parties prevails thus over the ordinary local rules relating to the jurisdiction of Dutch courts.⁶⁰ A Dutch court may even refuse its assistance to a party soliciting its intervention contrary to the terms of such a contract. When a foreign court or foreign arbitrators have rendered

⁵⁷ Ct. The Hague (June 8, 1917) W. 10208.

⁵⁸ Trib. Rotterdam (June 29) 1914, W. 8153.

⁵⁹ Kusters, 782.

⁶⁰ Lyon Ct. (May 17, 1918) W. 10282, (1918) N. J. 634.

a decision by virtue of such a contract, the judgment forms, as it were, a part of the contract itself, and may be enforced in Holland.⁶¹ When the party in whose interest the clause concerning the jurisdiction of a foreign court has been inserted voluntarily neglects his privilege, however, and brings the suit before a Dutch court, the autonomy of the parties does not go so far as to oust the Dutch court of its jurisdiction.⁶²

We make a single observation concerning the assignment of obligations, though the opinion of the Dutch courts can be deduced only from their settled views concerning the law governing contracts. The law governing the obligation of the debtor is generally the *lex domicilii debitoris*. This is especially the case as regards the moment at which the debtor may validly discharge the debt by paying the new creditor. The same law governs the question whether a legal notification is sufficient, or whether the assignment must be acknowledged in writing by the debtor, as Dutch law requires.

One of the main problems concerning the performance of contracts is that connected with acts of God (*vis major*). As regards international law the question is whether the effect of an act of God should be governed by other rules than the contract itself? Is there *vis major* when a foreign party in performing a contract subject to Dutch law, is liable to punishment according to his national law? I think there is some reason why the defence of *vis major* should be governed by a special rule. This point of view, though supported by the lower judges, found no favor with the Supreme Court, which held that foreign provisions (such as the British Trading with the Enemy Act of 1914) cannot interfere with the course of the law in the Netherlands; so that the punishment menacing the English debtor, cannot be considered as an act of God with respect to a contract governed by Dutch law.⁶³ The same ideas are to be found in a decision holding that a Dutch defendant cannot invoke *vis major* against a Dutch plaintiff on account of a Belgian "moratorium," even if the contract is subject to Belgian law.⁶⁴ A Dutchman, appearing in Holland and subject to Dutch law, cannot rely on the interdiction of payment without the consent of the Board of the German Reichsbank, even if the money was forwarded from Germany.⁶⁵

There are only a few decisions regarding the influence of bankruptcy

⁶¹ Ct. The Hague (May 12, 1916) W. 9996; Sup. Ct. (Dec. 8, 1916) W. 10054, (1917) N. J. 29; Trib. Amsterdam (Nov. 9, 1917), (1918) N. J. 108; Ct. Amsterdam (March 1, 1918) W. 10269, (1918) N. J. 1085; Sup. Ct. (Dec. 6, 1918), (1919) N. J. 129.

⁶² Trib. The Hague (Jan. 8, 1918) W. 10314.

⁶³ Trib. Rotterdam (Dec. 17, 1915) W. 9898, (1916) N. J. 434; Ct. The Hague (Nov. 24, 1916) W. 10060, (1917) N. J. 279; Sup. Ct. (Nov. 2, 1917) W. 10194, W. P. N. R. 2500.

⁶⁴ Trib. Amsterdam (May 25, 1917) W. 10092.

⁶⁵ Trib. Utrecht (Feb. 27, 1918) W. P. N. R. 2528, (1918) N. J. 1048.

on the execution of contracts, so far as international law is concerned. An interesting case arose with respect to the question whether a preference is to be governed by the law of the country where the adjudication of bankruptcy took place, or by the law applicable to the contract. The judge of first instance decided that the preference existing under Dutch law in favor of an unpaid seller of movables cannot be recognized when Belgian law governs the transaction, although the bankruptcy was pronounced in the Netherlands; inasmuch as the Belgian law does not entitle the seller of those goods to such a preference in case of bankruptcy. The Court of Appeal held, however, that the influence of bankruptcy upon the rights of the creditors was to be determined according to the law of the country where the adjudication of bankruptcy had taken place, because these consequences are closely connected with judicial process, as is the general seizure by way of bankruptcy. The preference is regarded, therefore, as a matter of public policy. The Supreme Court agreed with this view.⁶⁶

Particular Contracts. Contracts for labor and services are generally governed by the law of the country where the employer resides. All laborers in the service of one employer are therefore subject to one law. This is the opinion of our courts, which prefer this system to the application of the law of the place where the contract has been concluded or is to be performed.⁶⁷ The following case will show how little influence is sometimes attached to the place of performance. The county judge had decided, as judge of first instance, that a contract concluded in the German language between a German employer and a German laborer, ought to be governed by Dutch law, when the work was to be done in Holland. The non-fulfilment by the workman of his military service in Germany could not be considered, therefore, as a sufficient reason for the cancellation of the contract under German law. The appellate court entertained, however, another opinion. It applied German law to the contract and considered the non-performance of military duties as a sufficient ground to declare the contract terminated.⁶⁸

The law of the contractor or the employer is also decisive in contracts for work and other matters of this kind, for example, when a public corporation appears as the employer or when the work is regulated by the government.⁶⁹ We could compare this practice with the reasoning applied in insurance cases. All the insured are subject

⁶⁶ Trib. Amsterdam (Oct. 29, 1915), (1915) N. J. 1236; Ct. Amsterdam (Nov. 3, 1916), (1917) N. J. 353; Sup. Ct. (June 15, 1917), (1917) N. J. 812.

⁶⁷ Trib. Rotterdam (Dec. 2, 1896) W. 6993; Trib. Amsterdam (June 30, 1905) W. 8289; Trib. Amsterdam (Dec. 22, 1911) W. 9300.

⁶⁸ County Ct. Amsterdam (Oct. 19, 1915), (1915) N. J. 1108; Trib. Amsterdam (Jan. 18, 1918) W. P. N. R. 2529, (1918) N. J. 625.

⁶⁹ Trib. Amsterdam (April 25, 1913) W. 9579.

to a single law, viz. the law of the place where the insurance company has its domicile.

The contract of sale is governed by the ordinary rules. When the sale has taken place in public, at a market or an exchange, the law of the place where the act has been performed is the proper one.⁷⁰ If any localization is impossible, it is preferable to apply the law which the parties have either expressly or impliedly chosen. As to contracts of lease, the situation of the rented immovable or the purpose for which it is to be used, will have a predominant influence.

It would lead us too far to treat in detail the obligations incurred by signing commercial paper. We shall merely illustrate the above-mentioned rules by stating that when obligations arising from bills payable to order or to bearer are in question, each act is governed by the law of the place where the particular contract was made. In this way the law of the place where a bill had been drawn governs the drawing itself,⁷¹ and the law of the place of acceptance governs the latter. Indeed, third persons ought to be able to rely upon the fact that the consequences of every obligation are subject to the law of the country where the external distinctive mark of the obligation has been called into existence. The person acquiring the bill in good faith must be recognized as a holder.⁷² In the same way the law of the place where a bill has been endorsed decides whether the right to demand payment can be transferred by endorsement in blank.⁷³

Dutch law does not know quasi-contracts. Our legislation merely knows obligations derived from contracts and those imposed by the law, irrespective of agreement; the latter consist of obligations arising from facts and those arising from torts. Obligations arising from facts result from the voluntary performance of another person's business (the "*negotiorum gestio*" of Roman law) and from undue enrichment. Some authors consider the place where the act was done as decisive, disregarding the autonomy of the will, because the obligation is created by law. Others recognize, however, the influence of the will. They compare the performance of another's business with a supposed representation and the undue enrichment with the performance of a contract, in which a duty to pay exists on one side. Generally speaking, Koster⁷⁴ prefers the former solution. According to this writer there is rarely a special law which the person doing the act had in mind. The personal law of both parties could only be applied, if their personal law is the same and different from the *lex loci actus*. In most cases the latter law is decisive. There are no Dutch decisions on this subject.

(To be continued)

⁷⁰ Ct. Amsterdam (June 1, 1906) W. 8437.

⁷¹ Ct. The Hague (Nov. 10, 1903) W. 8017.

⁷² Jitta, 451.

⁷³ Ct. 's Hertogenborch (June 30, 1885) W. 5314.

⁷⁴ Koster, 790.